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SUPREME COURT, U. S.

No. 71-1318

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In the Supreme Court of the United States

OCTOBER TERM, 1971

DR. ROBERT E. HAM, ET AL., PETITIONERS

v.

GEORGE ROMNEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1313

DR. ROBERT E. HAM, ET AL., PETITIONERS

v.

GEORGE ROMNEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioners brought this class action on behalf of approximately 1,200 homeowners in the Meadowcreek Subdivision of Harris County, Texas. They seek, *inter alia*, to enjoin the Secretary of Housing and Urban Development from providing mortgage insurance with respect to a housing project to be constructed in Harris County. Petitioners allege that, because the existing sewage facilities in Harris County cannot accommodate the requirements of the contemplated project, 12 U.S.C. 1735f prohibits the Secretary from insuring mortgages for the new construction (App., *infra*, p. 4). Petitioners contend that the planned construction would diminish the

value of each homeowner's property by $1,000 (*ibid.*).

Petitioners sought to meet the $10,000 jurisdictional requirement (28 U.S.C. 1331) by aggregating the individual $1,000 claims of each homeowner comprising the affected class. The district court held that aggregation in these circumstances was impermissible, since petitioners had not asserted an undivided interest in a single claim, but rather were seeking to vindicate the separate and independent claims of the homeowners in the affected neighborhood (App., *infra*, pp. 3-7). Accordingly, the court dismissed petitioners' complaint for want of jurisdiction (Pet. App. 9-10). The court of appeals affirmed without opinion (Pet. App. 11-13).

2. The holding below is correct and further review is unwarranted. In *Snyder* v. *Harris*, 394 U.S. 332, this Court held that in class actions brought pursuant to Rule 23(b)(2) Fed.R.Civ.P. separate and distinct claims of the individual members of the class cannot be aggregated to meet the jurisdictional amount required by 28 U.S.C. 1331. In doing so, the Court rejected the contention—also made by petitioners here—that the 1966 amendment to Rule 23 altered this principle (394 U.S. at 338).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 71-H-121

DR. ROBERT E. HAM, and wife, LOIS HAM; A. G. FOWLER, JR.; PETER B. REA; WELDON CHOLLETT; LAWRENCE ENNIS; and MEADOWCREEK VILLAGE CIVIC CLUB, and in behalf of themselves and all residents, taxpayers, property owners, and persons similarly situated in Meadowcreek division or subdivision, PLAINTIFFS

v.

GEORGE ROMNEY, SECRETARY OF UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; CITY OF HOUSTON; ALLENDALE VILLAGE; and SAM KNIGHTON, DEFENDANTS

MEMORANDUM AND ORDER

This is a class action brought by certain residents of Meadowcreek Village, a residential subdivision of Houston, Texas. Plaintiffs sue in behalf of 4800 inhabitants of that subdivision, seeking broad injunctive relief against several defendants. The action complained of is the construction of a ninety-six unit federally assisted low income housing project of the type authorized by 12 U.S.C. § 1715z-1, commonly known as a "section 236" project. Joined as defendants are: (1) the United States Department of Housing and Urban Development, which approved the mortgage insurance for the project and agreed

to subsidize the debt service; (2) Allendale Village, an unincorporated association which is the project sponsor; (3) the City of Houston, which issued the necessary building permits; (4) Sam Knighton, the contractor. Motions to dismiss, in which all defendants join, have been filed.[1]

In substance, plaintiffs contend that the project was authorized and commenced without due regard to the requirement of 12 U.S.C. § 1735f, which provides that no new construction shall be approved for mortgage insurance unless served by adequate water and sewerage facilities. Asserting that such facilities are inadequate to support the additional burden created by the project, plaintiffs allege that existing businesses, residences, and schools in the community will be injured.

Jurisdiction is predicated upon 28 U.S.C. § 1331 (a), and therein lies the bone of contention. This jurisdictional statute requires, besides a federal question, that the matter in controversy exceed $10,000 in value. To satisfy this requirement, plaintiffs assert that each of 1,200 homes owned by members of the complaining class has been or will be damaged by the sewer overload in an amount of $1,000 per home, thus rendering the aggregate damage of the class well in excess of the jurisdictional amount. Defendants deny that the damages of each class member may be aggregated in this fashion.[2] The Court must agree with the latter view.

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[1] Also joined under misnomer in the original complaint was the lender, Home Savings Association. Although deleted from the amended complaint, this defendant joins the motion to dismiss, and the Court's action on same shall be deemed effective as to Home Savings.

[2] Defendants also assert that plaintiffs are without standing to bring this suit. Although there is some question that

The controlling case from this Circuit is *Alfonso* v. *Hillsborough County Aviation Authority*, 308 F.2d 724 (5th Cir. 1962), which involved a class action brought by approximately two hundred homeowners to enjoin the use of a neighboring airport. The complaint alleged that, by reason of low-flying aircraft, certain members of the class had suffered damage to their homes in excess of $4,000 each, and that others had been damaged in unspecified amounts. In holding that these were separate and distinct claims which could not be aggregated for the purpose of jurisdictional amount, the Court quoted the classic formulation of the rule from *Pinel* v. *Pinel*, 240 U.S. 594, 596 (1916):

> The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

Although the suit in *Alfonso* was a "spurious" class action for the purposes of old Rule 23(a)(3), the holding on the point of impermissible aggregation retains its vitality despite the 1966 revision of Rule 23. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Alvarez* v. *Pan American Life Insurance Company*, 375 F.2d 994 (5th Cir. 1967), cert. denied 389 U.S.

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plaintiffs' grievances are within the zone of interests to be protected or regulated by the National Housing Act, cf. *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), it is unnecessary to reach the question of justiciability.

827 (1967); see Annot., *Class Actions—Jurisdictional Amount*, ~~3 ALR Fed 32~~ (1970). 3 ALR 3rd 372

Like the homeowners in *Alfonso*, the plaintiffs in the instant case proceed as a class, but assert separate and distinct claims of damage to their various properties. Despite common questions of fact and law, the interests to be protected appear to arise only from the status of plaintiffs as homeowners in the affected neighborhood and these interests are otherwise united by no single title or right. Cf. *Potrero Hill Community Action Committee* v. *Housing Authority*, 410 F.2d 974 (9th Cir. 1969). As noted above, none of these individual claims is alleged to exceed $1,000. Aggregation being unavailable, the requisite amount in controversy is not present, and subject matter jurisdiction under 28 U.S.C. § 1331 does not exist.[3]

Accordingly, the motions to dismiss are well taken. Rule 12(b)(1), Fed.R.Civ.P. Leave is hereby granted plaintiffs for a period of thirty (30) days within which to amend their complaint in such fashion as properly to allege the jurisdiction of this Court, failing which plaintiffs' complaint shall be dismissed.

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[3] Defendant makes reference to 12 U.S.C. § 1702. This provision authorizes the Secretary to be sued, but does not create a cause of action nor operate as an independent fount of judisdiction. *Choy* v. *Farragut Gardens*, 131 F.Supp. 609 (S.D. N.Y. 1955); *United States* v. *Holder*, 292 F.Supp. 826 (S.D. Iowa 1968). Neither party relies upon or discusses the possible applicability of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. Suffice it to say that the Secretary's assessment of sewerage sufficiency would appear by its nature to be a matter "committed to agency discretion." 5 U.S.C. § 701(a)(2).

The Clerk shall send copies of this Memorandum and Order to counsel.

DONE at Houston, Texas, this 29th day of June, 1971.

/s/ James Noel
Judge

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